No. 83-1667

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT A. WILLIAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioners contend that a retrial upon a superseding indictment returned after a jury was unable to reach a verdict on the first indictment would violate the Double Jeopardy Clause.

1. On January 4, 1983, petitioners were indicted on a five-count indictment charging conspiracy to procure false statements under oath in federal court and to produce and offer under oath in federal court a materially false North Carolina hunting license knowing it to be false, in violation of 18 U.S.C. 371 (Count One). Thomas Williams and Robert Williams were also charged on several counts of making a false declaration under oath, in violation of 18 U.S.C. 1623 (Counts Two through Five). Following a jury trial in the United States District Court for the Western District of North Carolina, Thomas Williams was convicted on one count of making a false declaration (Count

Two) and Robert Williams was acquitted of making a false declaration (Count Five). Pet. App. 2A.[1] The jury was unable to reach a verdict on the conspiracy charge, however, and the district court declared a mistrial (*id.* at 2A-3A).

On the following day, March 11, 1983, the grand jury returned a superseding indictment charging one count of conspiracy. The new indictment included the same facts alleged in Count One of the original indictment, but it omitted some erroneous facts regarding the issuance of summonses and added some additional overt acts. The district court granted petitioners' motion to dismiss the superseding indictment on the theory that it would violate double jeopardy to try them on that indictment because it was returned without dismissing the original indictment, on which jeopardy had attached. *Id.* at 3A. The court of appeals reversed (*id.* at 1A-8A).

The evidence at trial showed that on September 4, 1982, the first day of the North Carolina hunting season for mourning doves, petitioners Robert Williams, David Williams and Thomas Williams went hunting and killed a total of 30 doves (Tr. 4, 9, 23, 27).[2] Thomas Williams did not have a hunting license (Tr. 8, 10, 11), and the daily legal limit per hunting license at the time was 12 doves (Tr. 77). At approximately 6:35 p.m., officers of the North Carolina Wildlife Resources Commission stopped to check petitioners' liceneses and weapons (Tr. 6). Thomas Williams told the officers that he had not been hunting and did not have a license (Tr. 8, 10, 11). Robert Williams claimed "most" of the doves, and David Williams acknowledged the remainder

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[1]On the government's motion, Counts Three and Four were dismissed during trial (Pet. App. 2A).

[2]Mourning doves are migratory game birds, the possession of which is regulated by federal law. See 16 U.S.C. 703; 50 C.F.R. 20.34.

as his (Tr. 112). Robert and David Williams later were charged with aiding and abetting possession of mourning doves in excess of the daily bag limit (Tr. 88, 112).

Once the officers departed, Thomas Williams went to consult his uncle, petitioner Boyd Williams. The two visited Gerald Silvers, who owned and operated a local store that sold hunting licenses. Tr. 28-29. They found Silvers at his home and persuaded him to return to his store and issue Thomas Williams a hunting license back-timed to show issuance prior to the time the officers had investigated the hunting party (Tr. 32-38; GX 9).[3]

At the preliminary hearing on the possession charges against Robert and David Williams, Thomas Williams was called as a witness (Tr. 87). On cross-examination, Thomas Williams produced the falsified license and testified that he had obtained it prior to the hunt but had not displayed it to the officers because he was not asked for it (Tr. 110; GX 9). During the hearing, both David and Robert Williams referred to the hunting license (GX 3, 5, 6). Boyd Williams also addressed the magistrate during the hearing stating: "I'd just like to say that all three of them had valid hunting licenses. They were all three together, and all three stated they were hunting, and the limit would have been thirty-six birds if all three of them killed their limit and they didn't have but thirty birds" (GX 8). All four petitioners knew at the hearing that petitioner Thomas Williams had not possessed a hunting license during the hunt (Tr. 33-34, 113).

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[3]Hunting licenses are numbered in order by time of issuance. Because Silvers had issued a license at 5:00 p.m., the earliest time he could record on the falsified license was 5:15 p.m., which was earlier than the officers checked the licenses but not earlier than petitioners' hunt began (Tr. 33, 34).

3. a. Petitioners contend (Pet. 5-11) that return of a superseding indictment after a hung jury, without dismissal of the original indictment, violates the Double Jeopardy Clause. They do not suggest, however, how any interest protected by the Double Jeopardy Clause is implicated by the procedure followed here. It has never been contended that the government has the right to go to trial on both indictments; the retrial would be solely on the second indictment. Moreover, petitioners do not (and could not) seriously contend that the government could not obtain a superseding indictment if it had dismissed the first indictment after the mistrial.[4] For double jeopardy purposes, there is no reason why this case should be treated any differently simply because the first indictment was not dismissed. Therefore, the court below correctly concluded that the government is permitted to try petitioners on the second indictment. Accord, *United States* v. *Cerilli,* 558 F.2d 697, 701 (3d Cir.), cert. denied, 434 U.S. 966 (1977).

Petitioners suggest that the Court should grant review here because of "an apparent conflict of authority" in the courts of appeals (Pet. 5). This suggestion is completely without merit. The cases relied upon by petitioner are all cases in which the double jeopardy claim was *rejected.* Petitioners apparently rely on the general statement in those cases that the government may bring two indictments so long as jeopardy has not attached to either indictment. We have no quarrel with that statement, as far as it goes.[5] However, there is no reason to think that any of those

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[4]The statements in other cases on which petitioners rely are expressly limited to the situation where the second indictment is obtained "prior to dismissal of [the first] indictment." See, *e.g., United States* v. *Grabinski,* 674 F.2d 677, 680 (8th Cir. 1982).

[5]For example, prior to the termination of the first trial by the declaration of the mistrial, the government could not have attempted to try the defendants on a second indictment.

courts would find a double joepardy problem where, as here, a superseding indictment was obtained after the trial on the first indictment ended in a mistrial. The courts were not considering that question, and it is quite clear that a defendant can be retried after a mistrial without subjecting him to double jeopardy. See *United States* v. *Sanford,* 429 U.S. 14 (1976); *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824).[6] As the cases petitioners rely upon themselves hold, there is no reason why the retrial cannot be upon a superseding indictment. Hence, petitioners' claim of a conflict is specious.

b. Petitioners also argue (Pet. 8-9) that the superseding indictment impermissibly broadened the scope of the conspiracy and incorporated their trial defense, thus forcing them to expose themselves to perjury charges in order to mount a defense at the second trial. They point to no specifics to support this contention, and it is not apparent from a comparison of the two indictments that there is any factual basis for this claim.[7] In any event, it is clear that

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[6]Of course, this rule does not, as petitioner suggests, "allow a prosecutor after the declaration of a mistrial *for whatever reason* to return to the Grand Jury and secure a second indictment * * *" (Pet. 6-7 (emphasis added)). It is well established that retrial after a mistrial is not permitted where the prosecution deliberately provoked a defendant's motion for a mistrial for tactical reasons or where a mistrial was granted over the defendant's objection in the absence of manifest necessity. See generally *Oregon* v. *Kennedy,* 456 U.S. 667, 672-673 (1982). These restrictions also would apply where the government sought to retry on a superseding indictment, but they are not applicable in this case where the jury was unable to reach a verdict. See *Richardson* v. *United States,* No. 82-2113 (June 29, 1984), slip op. 7.

[7]The essential purpose of the conspiracy charged in both indictments was the same: to exonerate Robert and David Williams from federal charges of unlawful possession of mourning doves. The means of effecting that object was the same in both indictments: the procurement of a materially false North Carolina hunting license issued to Thomas Williams. The only way the superseding indictment differed from the original was in the addition of four overt acts (Nos. Four, Six, Eight and

petitioners do not allege any constitutional violation. At a retrial after mistrial, a prosecutor is permitted to do "what every trial lawyer tries to do: improve his chances of winning on retrial by learning from his mistakes at the original trial. * * * The only 'penalty' [to the defendant] is nothing more than the risk that all litigants run if a case is retried: your adversary may make adjustments in his case based on what he learned at the first trial." *United States* v. *Motley*, 655 F.2d 186, 190-191 (9th Cir. 1981) (footnote omitted).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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Nine) and the amendment of Overt Act Seven to correct a factual error, namely, that summonses were issued not when the officers stopped to check licenses but rather sometime later. While these additions may have added detail to the original indictment by specifying additional acts in furtherance of the conspiracy, they added nothing to the basic scope of the conspiracy. Even the more simplified original indictment included what petitioners apparently refer to as their defense, *i.e.*, that they secured the fraudulent hunting license in order to protect Robert and David Williams from the federal charges and Thomas Williams from the state charge of hunting without a license.

DOJ-1984-07